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Supreme Court, U.S.
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No. 06-134

In the
Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS AND THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the exception to sovereign immunity for cases "in which rights in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4), provide jurisdiction for a municipality's lawsuit seeking to declare the validity of a tax lien placed upon real property owned by a foreign sovereign?

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The decision of the United States Court of Appeals for the Second Circuit is reported sub nom. City of New York v. Permanent Mission of India to the UN at 446 F.3d 365 (2d Cir. 2006) and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 1 to App. 24.

The memorandum and order of the United States District Court for the Southern District of New York is reported sub nom. City of New York v. Permanent Mission of India to the UN at 376 F.Supp. 2d 429 (S.D.N.Y. 2005), and is also reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 25 to App. 45.

STATEMENT OF THE CASE

Petitioners each own and operate multi-storey properties in midtown Manhattan, in New York City. The upper twenty floors of India's building are devoted exclusively to housing for staff of India's Permanent Mission to the United Nations, and of the Indian consulate in New York, below the level of head of mission, and their families. The top three floors of Mongolia's building are devoted exclusively to housing for staff of Mongolia's Permanent Mission to the United Nations, below the level of head of mission, and their families.[1] The City of New York ("the City") has assessed real property taxes on these portions of the property, since 1981 as to Mongolia's building, and since 1991, as to India's building, which taxes have not been paid. The total arrearage continues to grow through the imposition of interest charges and additional yearly tax assessments. As a result, by operation of law, the City holds a tax lien covering both properties.[2]

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[1] The remaining floors of each building, which floors are not the subject of this case, are used as offices of petitioners' United Nations missions, and in Mongolia's case, as the ambassador's residence.

[2] Real property tax liens arise as a matter of law in New York City, pursuant to NYC Administrative Code § 11-301 and New York Real Property Tax Law § 102(21), when municipal real property taxes are unpaid. Such liens encumber the property until they are paid, NYC Administrative Code § 11-301, and may be sold or assigned. NYC Administrative Code §§ 11-301 to 11-329, 11-332, 11-333.

The City commenced actions against the petitioners pursuant to New York City Administrative Code Title 11,[3] seeking to obtain declarations of the validity of the liens and to embody them in judgments, although not to foreclose against the present owners.[4] The action asserted that petitioners are not immune from liability for the taxes, charges and interest forming the subject-matter of the lien under local, state, federal or international law,[5] and that

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[3] The New York City Administrative Code authorizes a proceeding to reduce tax liens to judgment after they are outstanding for one year. NYC Administrative Code §§ 11-354, 11-335.

[4] The potential for execution under any judgment ultimately rendered in the proceedings is not implicated, since the City has represented in the suit that it is seeking only a judgment establishing the validity of the existing tax liens, and not execution upon the property.

[5] The Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 (1972), and the Vienna Convention on Consular Relations, 21 U.S.T. 77, Art. 32 (1969), exempt from real property taxation only so much of foreign-owned real property as is used exclusively for the purposes of maintaining the offices of a United Nations mission or consulate, or the residence of a head of mission. New York State's Real Property Tax Law § 418(1) follows the same formula. Similarly, the State Department has informed foreign governments that "[a]bsent a bilateral agreement, property tax exemption is not generally granted to residences owned by foreign governments used to house members of consular posts or international organizations, except . . . for career heads of the consular posts or chiefs of missions to the international organizations." U.S. Department of State, Guidance for Administrative Officers § 7.8, January 4, 2004. See also, U.S. Department of State, Diplomatic Note HC-18-93, April 14, 1993; U.S. Department of State, Diplomatic Note HC-06-93, February 17, 1993; U.S. Department of State, Diplomatic Note HC-12-01, April 5, 2001. The State Department's Guidance, at § 7.8, suggests that a broader exception for premises used to house all diplomatic staff is applicable only to embassies and consulates within the Washington, D.C. metropolitan area, subject to reciprocal treatment of similar United States-owned property abroad.

jurisdiction is appropriate under the Foreign Sovereign Immunities Act of 1976 ("the FSIA"), 28 U.S.C. §§ 1602 through 1611. At 28 U.S.C. § 1605(a)(4), the FSIA exempts from the jurisdictional immunity of a foreign state cases "in which . . . rights in immovable property situated in the United States are in issue." At 28 U.S.C. § 1605(a)(2), the FSIA exempts from such immunity those actions that are "based upon a commercial activity carried on in the United States by the foreign state."

The cases were removed by petitioners to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1441(d). Petitioners then moved to dismiss the complaints for lack of subject matter jurisdiction, upon the ground of immunity from suit under § 1604 of the FSIA. The District Court held that it had jurisdiction under the FSIA's immovable property exception, basing its conclusion upon "[t]he international practice that the immovable-property exception codifies and the legislative history of the FSIA," and on the fact that "the tax liens place [petitioners'] and the City's rights in the properties in issue." App. 44, 376 F.Supp.2d at 439. The District Court relied heavily upon the decision of Scalia, J., in Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984), which noted that the FSIA's enactment codified the restrictive view of foreign sovereign immunity, and that the FSIA's immovable property exception recognized "what is understood in domestic property jurisprudence to be the 'local-action rule'" requiring that the determination of rights in real property be judicially determined by the jurisdiction in which it is sited. Id. at 1521. The District Court did not reach the merits of the commercial activity argument, and it emphasized that its decision addressed the jurisdictional

threshold and not the substantive issue of whether the properties are exempt from tax liability. App. 44-45, 376 F.Supp.2d at 439. This interlocutory appeal ensued.

The Court of Appeals for the Second Circuit unanimously affirmed, holding that the immovable property exception of the FSIA confers jurisdiction because "[w]hat is in dispute in this case is the extent of defendants' obligations under local law (here, property taxes) arising directly out of their ownership of real property in the United States." App. 21, 446 F.3d at 376. Although the City had emphasized, and continues to emphasize, that the rights in issue were embodied in a lien upon the property, the Court held that the right to tax, itself, is a right in immovable property that provides a permissible basis for jurisdiction, and that the Court "would reach the same result had this action been filed purely to obtain a declaratory judgment" regarding the taxable status of the properties. App. 21 n.16, 446 F.3d at 376 n.15. Like the District Court, the Court of Appeals did not reach the commercial activity exception, although the City had emphasized, and continues to emphasize, its applicability as an alternative ground for jurisdiction.[6]

The Court rejected petitioners' argument "that the immovable property exception is limited to cases in which the parties dispute title, ownership or possession of the

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[6] The Court, however, noted that as an owner of real estate, a foreign government was acting in a private rather than in a sovereign capacity. App. 9, 446 F.3d at 370, citing Republic of Argentina v. Weltover, 504 U.S. 607, 612, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992). This is the analytical framework of the commercial activity exception, under which the private acts of a foreign sovereign are not immune.

immovable property itself," App. 7, 446 F.3d at 369. It concluded that the exception should be construed to include any case involving the foreign country's obligations arising directly out of the use of property situated in the United States, in addition to their rights to, interest in, use or possession of such property, App. 17-18, 446 F.3d at 374. Such obligations, the Court noted, are "simply the flip side" of the City's rights in the property, and the provision is not restricted, as petitioners argued, to "cases where the foreign government's rights in the property are in issue." App. 8, 446 F. 3d at 369.

The Court based its conclusion upon the plain language of 28 U.S.C. § 1605(a)(4), which does not limit itself to rights of possession or ownership. App. 8, 446 F. 3d at 369. The Court noted, as did the District Court, that "[o]wnership of property connotes a bundle of related rights and obligations defined by local property law. A foreign state cannot assume the benefits of ownership . . . while simultaneously disclaiming the obligations associated with them." App. 16, 446 F.3d at 374. The Court further noted that "at the time that the FSIA was enacted, the New York legislation at issue in this case was already in place," and that, as disclosed by such case law as Republic of Argentina v. City of New York, 25 N.Y.2d 252, 250 N.E.2d 698, 303 N.Y.S.2d 644 (1969), "courts had jurisdiction to hear disputes such as this one." App. 17 n.12, 446 F.3d at 374 n.11.

The Court, as had this Court in Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992), and the District of Columbia Circuit in Reclamantes, 735 F.2d at 1521, also

examined the FSIA's legislative history,[7] which made clear that "Congress's intent in enacting the FSIA was to largely codify the restrictive theory of sovereign immunity," which accords immunity "only where a state is acting in a sovereign capacity." App. 9, 446 F.3d at 370. The Court further noted that the "ownership of real estate in a foreign country . . . is not inherently a sovereign act." The Court observed that "the FSIA was intended . . . to bring the United States into conformity with other countries that had already adopted or were in the process of adopting the restrictive theory." App. 12, 446 F.3d at 371.

Before reaching its decision, the Court of Appeals requested the views of the Department of State on whether or not the immovable property exception "should be interpreted to accord with the more detailed version of this provision found in . . . the United Nations Convention on Jurisdictional Immunities of States and their Property, [and . . .] the European Convention on State Immunity," and asked whether "any considerations of diplomatic and foreign relations counsel a relatively narrow or expansive reading of this exception." App. 56-57. The Department of Justice, writing on behalf of the State Department, argued in favor of a narrow interpretation of the immovable property exception, so as to preclude jurisdiction in this case. App. 57-73. It advised that a decision upholding jurisdiction would be controversial within the diplomatic community, that it might result in interference with the operations of United States missions abroad, and that the pendency of the suit had already adversely affected

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[7] H.R. Rep. No. 1487at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

bilateral relations with an unspecified one of the petitioner governments. App. 74-75. The Court of Appeals "carefully considered . . . the United States' arguments sounding in public policy" and was "not persuaded." App. 21, 446 F.3d at 377. The Court also "looked carefully at the United States' brief statement of potential foreign policy concerns, and found them "not presently to justify a dismissal on foreign policy grounds." App 22 n.17, 446 F.3d at 377 n.16.

REASONS FOR DENYING THE WRIT

I. There Is No Significant Conflict Between the Circuits. The Second Circuit's Decision Was Consistent With And Built Upon Other Case Law. The Only Apparently Inconsistent Decision Is Twenty-One Years Old And Represents Nothing More Than A Transitional and Superficial Split Between the Circuits.

Looking at the relevant decisions of other circuit Courts of Appeal, the Second Circuit noted that its holding was "entirely consistent with" the District of Columbia Circuit's decision in Asociacion de Reclamantes v. United Mexican States, 735 F.2d at 1517, and "indeed builds upon the groundwork it laid." App. 20, 446 F.3d at 375. The Second Circuit concurred, as well, with "the methodology [Reclamantes] employed (looking at international practice around the time of the FSIA's enactment)." Id. The Reclamantes Court rejected a claim by the successors in

interest to the recipients of land grants from Mexico who were driven from their land in the period following the Mexican War, and who claimed that Mexico had assumed the responsibility for compensating them for their lost land but had not done so. Reclamantes concluded, as did the Second Circuit here, that the immovable property exception was enacted to codify a real property exception to sovereign immunity recognized by international practice.

Reclamantes held that the claims involved there were not "property interests in real estate, such as a leasehold, easement or servitude, nor possessory rights, nor even rights to payment of money secured by an interest in land," 735 F.2d at 1523, and that the involvement of real property in the suit was "purely of historical interest, having no bearing upon present property interests." Id. In so holding, Reclamantes placed "rights to payment of money secured by an interest in land" among those rights that fall within the FSIA's definition of rights in immovable property. Id. Reclamantes cited with approval County Board v. Government of the German Democratic Republic, Civil No. 78-293-A (E.D. Va. Sept. 6, 1978) (reprinted in 17 Int'l Legal Materials 1404 (1978)), in which a county taxing authority sued a foreign sovereign for delinquent real estate taxes, including, as in this case, a "prayer for declaratory judgment that the property in question was subject to the state's statutory tax lien in favor of the county." See, 735 F.2d at 1522. The District Court there held that there was jurisdiction to entertain the suit under § 1605(a)(4) of the FSIA.[8]

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[8] Following rendition of a judgment in favor of the County in County Board, the Attorney General, at the request of the Department of State,

Like the District Court here, the Reclamantes court observed that the same considerations that produced the real property exception also underlie the local action rule, which doctrines "are obviously complementary, since the local action rule without the real property exception to sovereign immunity would mean that real property disputes involving foreign sovereigns could not be resolved in any court." Id. at 1521-1522.[9]

The Second Circuit here also noted that its holding was not inconsistent with other decisions which denied jurisdiction under the immovable property exception, because those disputes "did not directly implicate present real property interests because the plaintiffs sought only money damages and not any adjudication of property rights." App. 19n, 446 F.3d at 376n.[10]

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filed another action, which was not challenged under the FSIA, seeking a declaratory judgment that the property was exempt from county tax and seeking an injunction prohibiting further attempts to collect such taxes. In that action, the subject tax assessments were held violative of bilateral international agreements and of customary international law as it applied to the metropolitan area surrounding the nation's capital. United States v. County of Arlington, 669 F.2d 925, 928 (4th Cir. 1982), cert. denied sub nom. County of Arlington v. United States, 459 U.S. 801, 103 S. Ct. 23, 74 L. Ed. 2d 39 (1982), appeal after remand sub nom. United States v. County of Arlington, 702 F.2d 485 (4th Cir. 1983).

[9] In New York, as elsewhere, actions involving liens are subject to the local action rule. See, e.g., J. V. Dempsey, Lien as Estate or Interest in Land Within Venue Statute, 2 A.L.R.2d 1261 (1948)

[10] MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918 (D.C. Cir. 1987); and Fagot Rodriguez v. Republic of Costa Rica, 297 F.3d 1 (1st Cir. 2002).

The Court found "unpersuasive," App. 20n-21n, 446 F.3d at 376 n.14, the only apparently contrary decision, that of the Third Circuit Court of Appeals in City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31 (3d Cir. 1985), though it characterized the case as a denial of jurisdiction upon apparently similar facts. Upon closer examination, Englewood does not present a deep or meaningful split between the circuits.

The Third Circuit in Englewood only briefly and parenthetically discussed the immovable-property exception to immunity from suit under 1605(a)(4) of the FSIA. Citing Reclamantes, and no other authority, for a proposition that Reclamantes does not support, the Third Circuit characterized the exception as probably having been intended to apply only to title disputes. Accordingly, the Court stated that the immovable property exception "does not apply," 773 F.2d at 36.

Englewood was decided in 1985, one year after Reclamantes, within ten years of enactment of the FSIA, and over twenty years before this decision. In the interim, international jurisdictional norms have evolved, both through the preparation of draft conventions, and through ongoing interactions between local taxing authorities, the United States, and the United Nations and diplomatic communities.[11] This decision and Reclamantes represent a rational continuum, as the Second Circuit noted, and Englewood is not likely to be followed, even within the Third Circuit.

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[11] See footnote 5, infra.

In Englewood, "[t]he dispute giving rise to the . . . litigation [arose] out of efforts of the City of Englewood, New Jersey, to tax a parcel of improved real estate purchased by Libya as a residence for its Head of Mission to the United Nations." 773 F.2d at 32. When the City of Englewood sought a tax increase in the state tax court, Libya sought an exemption from taxation, and the proceeding was removed to the federal courts.[12] The decision in Englewood considered the immunity of Libya's property from execution under 28 U.S.C. §§ 1609 and 1610(a)(4)(B),[13] which it characterized as "substantially

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[12] The Third Circuit noted that, rather than dealing with the matter under the FSIA's immovable property exception, and "[r]ecognizing . . . that New Jersey law makes no provision for in personam enforcement of liability for real estate taxation, the [District C]ourt turned to the more practical consideration of whether Englewood could execute against the property in an in rem foreclosure of the claimed lien of its tax assessment." Englewood, 773 F.2d at 34. The District Court held that since the property was used as only a part-time weekend retreat and was not the primary residence of the head of mission, and because it was used for a commercial activity, it was subject to attachment and execution under 28 U.S.C. §§ 1609 and 1610(a)(4)(B). Id. The decision that was presented for review in Englewood, therefore, was not premised on the FSIA's exceptions to immunity from suit.

[13] Although the Second Circuit here chose not to distinguish Englewood, the different state tax and lien laws governing in Englewood and in this litigation are significant in placing the two litigations in context, as the City argued in the Second Circuit. See, City's Second Circuit Brief at p. 39. Under New Jersey law, no judicial action is necessary as a precondition to forcing a sale of real property for failure to satisfy a tax lien. New Jersey Stat. § 54:5-19 provides: "When unpaid taxes or any municipal lien, or part thereof, on real property, remains in arrears on the 11th day of the eleventh month in the fiscal year when the same became in arrears, the collector or other officer charged by law in the municipality with that duty, shall . . . enforce the lien by selling the property . . . ." In contrast, the New York City Administrative Code, at §§ 11-354 and 11-335, requires judicial authorization for enforcement through execution upon the property.

parallel" to the sections of the FSIA pertaining to "the general rule of immunity from personal jurisdiction." 773 F.2d at 35. It stated that "[t]he case for an exception, either to section 1604 or to section 1609 turns . . . on whether," as the District Court had held, Libya was engaging in a "commercial activity," 773 F.2d at 36, rather than on the immovable property exception.[14]

Given the brevity, superficiality and vintage of the Third Circuit's discussion, the District Court in this case was correct in noting that "[i]n light of the treatment of the immovable-property exception in Englewood, that case does not offer . . . adequate support to overcome the authority bolstering the City's position." App. 41, 376 F. Supp. 2d at 438. In the case's current posture, it similarly does not present a cognizable conflict between circuits, and thus presents an insufficient basis for review.

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[14] The Third Circuit rejected the District Court's reasoning that the commercial activity exception applied "because the property was acquired by Libya in a commercial transaction between a seller and a buyer," noting that "[t]he only purpose Libya has in holding the property . . . is for use by the Chief of its Mission to the United Nations," which it held to be "activity directly related to the purposes of the mission, and as a matter of law such use is not commercial activity." 773 F.2d at 37.

II. The Court of Appeals Correctly Relied Upon The Language Of The Statute And Its Legislative History To Determine That The Dispute Before The Court Came Within The FSIA's Immovable Property Exception. Petitioners Are Mistaken In Their Characterization Of The Court's Discussion Of International Conventions.

Petitioners take issue with the Second Circuit's conclusion that a dispute concerning the validity of tax liens puts a right in immovable property in issue, and they attack the Court's discussion of international conventions that were adopted or drafted roughly contemporaneously with the enactment of FSIA as an improper basis for the Court's decision. Neither issue provides an appropriate ground for review.

The Court of Appeals did not, as petitioners urge, act improperly in rejecting petitioners' argument that "rights in immovable property" should be read to exclude tax liens. Its analysis began, correctly, with the language of the statute, which, on its face, includes any dispute that directly involves any recognized legal right in immovable property, without being limited to rights to title, possession, use or servitudes.[15] The Court noted that the legislative history is to the same effect.[16] The Court did not, as

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[15] As with any question of statutory interpretation, the language of the statute is paramount, see, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450, 151 L. Ed. 2d 908, 122 S. Ct. 941 (2002).

[16] As stated by the House Report, even as to "property . . . used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission" (H.R. rep. No. 94-1487 at 20, reprinted at 1976 U.S.C.C.A.N. at 6619): "Actions short of attachment

petitioners argue, ignore a purported distinction between rights and security interests in real property. It found such distinctions irrelevant, first, because the taxability of the property itself is a right that brings the subject matter of the dispute within the exception from sovereign immunity, and, second, as the City emphasized, and continues to emphasize, because a tax lien upon real property is a right in immovable property which is carved out of, encumbers and diminishes the right of the fee holder, and a judgment on the merits in the instant proceeding will either sustain or extinguish the right that is embodied in the lien.[17]

Although petitioners may be correct in asserting that prior to the enactment of the FSIA, no court exercised jurisdiction over a real property tax dispute, see Petition for Certiorari, at pp. 14-15. this proposition is of no significance, because it is also true that no court during that

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or execution seem to be permitted under the [Vienna] Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and other similar matters, as long as the foreign state's possession of the premises is not disturbed."

[17] Under New York Real Property Tax Law § 102(21), real property tax liens are encumbrances upon real property, which in turn are rights in property, Warren's Weed New York Real Property, at § 91.30. They are perpetual in duration, L. K. Land Corp. v. Gordon, 1 N.Y.2d 465, 136 N.E.2d 500, 154 N.Y.S.2d 463 (1955), and continue to encumber the property until they are paid. They run with the land. New York City Charter § 1519(2). They may be sold or assigned. NYC Administrative Code §§ 11-301 to 11-329, 11-332, 11-333. Such sales and assignments are defined as conveyances and are required to be recorded as such. NYC Administrative Code § 11-330. Conveyances are further defined as transfers of an "interest in real property." New York Real Property Law § 240(2). If not discharged, the liens will reduce the value of a property and will ultimately serve to divest the eventual non-diplomatic title-holder of both title and possession. See, NYC Administrative Code § 11-301.

period declined to exercise such jurisdiction. However, in 1978, two years after enactment of the FSIA, the court in County Board v. German Democratic Republic, 17 Intl Legal Materials 1404, did exercise jurisdiction.[18]

Once the Court of Appeals concluded from the legislative history of the FSIA that the statute "was intended . . . to bring the United States into conformity with other countries that had already adopted or were in the process of adopting the restrictive theory," the Court "look[ed] at contemporaneous expressions of the content of this exception to sovereign immunity for actions involving real property owned by the foreign state." App. 12, 446 F.3d at 371. In so doing, it followed the statement of Reclamantes that "the immovable property exception was enacted to codify . . . the pre-existing . . . exception . . . recognized by international practice." Reclamantes, 735 F.2d at 1521. These included Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965) (also relied on by Reclamantes, 735 F.2d at 1521), and the European Convention on State Immunity, May 16, 1972, ETS No. 74, "which was drafted in 1972 and ratified in 1976, just prior to the enactment of the FSIA." App. 13, 446 F.3d at 371-372. In order to further clarify the general level of acceptance of the restrictive theory of sovereign immunity as applied to the law of real property at the time

[18] No appeal was taken from that decision. See also York River House v. Pakistan Mission to the U.N., 1991 U.S. Dist. LEXIS 13683 (S.D.N.Y. 1991) (Leval, J.) (applying immovable property exception to plaintiff's lease dispute with Pakistan Mission to the U.N, even though, as the court subsequently held, York River House v. Pakistan Mission to the U.N, 820 F. Supp. 760 (S.D.N.Y. 1993), the lessor could not be evicted).

of the FSIA's enactment, the Court also made reference to the report of the International Law Commission, in preparation for a draft United Nations Convention on Jurisdictional Immunities of States and Their Property, which project commenced shortly after the FSIA's enactment.[19] That document, the Court noted, discussed the longstanding international understanding that "[t]he acquisition and continued ownership of property in a foreign country 'is made possible only by virtue of the application of the internal law or private law of the State of the situs.'" App. 15-16, 446 F.3d at 373.

The Court of Appeals thus made reference to the international conventions as extrinsic aids to interpretation, or, in petitioners' own phrase, to "inform the proper interpretation of U.S. law intended to codify preexisting international law." Petition for Certiorari, p. 12. The Court of Appeals noted that both conventions embodied an international acceptance of the restrictive view of foreign sovereign immunity in disputes arising in connection with real property. It is irrelevant that the European Convention is inapplicable to the United States or to petitioners, that neither the United States nor petitioners are signatories to the United Nations Convention, that the latter convention would seek to resolve jurisdictional disputes through the International Court of Justice in the Hague, or that both conventions are applicable to private disputes.

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[19] International Law Commission, Documents of the Thirty-Fifth Session, II Y.B. Int'l L. Comm'n 47, U.N. Doc. A/CN. 4/363 and Add. 1 (1983).

III. The Court Of Appeals Appropriately Discussed Congressional Appropriations Acts That Were Of Relevance To The Subject Matter Of The Litigation.

Petitioners misapprehend the nature and extent of the Court of Appeals' consideration of the Foreign Operations, Export Financing Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2005); and the Consolidated Appropriations Act of 2005, P.L. No. 108-447, § 543 (2004). These enactments require that 110 percent of unpaid property taxes owed by any country, as determined "in a court order or judgment entered against such country by a court of the United States or any State or subdivision thereof," be withheld from that country's foreign aid. The primary bases for the Court of Appeals' decision were not the Appropriations Acts, but rather a textual analysis of the statute, its legislative history, and the accepted parameters of the restrictive view of foreign sovereignty. In noting that "Congress has been actively involved in the issues directly pertaining to this litigation," App. 5, 446 F.3d at 368, the Court merely found an additional reason to reject "the narrow interpretation of the immovable-property exception put forward by [petitioners]," which it found "difficult to square with Congress's explicit reliance on the courts to adjudicate the property tax liabilities of foreign governments." App. 11, 446 F.3d at 371.

The Court thus did not, as petitioners argue, use "the views of a subsequent Congress [to infer] the intent of an earlier one." Cf. United States v. Price, 361 U.S. 304, 313,80 S. Ct. 326, 4 L. Ed. 2d 334 (1960). In any event,

although in presuming harmony between enactments, "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight." Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596, 100 S. Ct. 800, 63 L. Ed. 2d 36, (1980). See also, Federal Housing Administration v. Darlington, Inc., 358 U.S. 84, 90, 79 S. Ct. 141, 3 L. Ed. 2d 132 (1958); Bell v. N.J., 461 U.S. 773, 784, 103 S. Ct. 2187, 76 L. Ed. 2d 312 (1983).[20]

Rather, the Court emphasized that petitioners had presented no reasons that would justify a holding that would "make dead letters out of Congress's recent enactments, which were intended to address the exact controversy before [it]." App. 12, 446 F.3d at 371. The Court was appropriately loathe to "lightly reach such a result," particularly "where nothing in the statutory language or legislative history remotely requires it." Id.

It is not improper for a Court, as the Court of Appeals did here, to reject a statutory construction urged by a litigant that would, without a textual or other basis for that construction, render later enactments by Congress

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[20] Other authorities cited by petitioners are not relevant. The Court of Appeals did not characterize the appropriations acts as measures that repealed FSIA by implication, limited its operation, or conflicted with it. Cf. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190-191, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978); see also, Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1558 (D.C. Cir. 1984); United States v. Langston, 118 U.S. 389, 6 S. Ct. 1185, 30 L. Ed. 164 (1886). It certainly did not seek to apply the appropriations acts as measures negating or superseding administrative actions. Cf. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 629, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990).

ineffectual. See, Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), affd. sub nom. Reagan v. Abourezk, 484 U.S. 1, 108 S. Ct. 252, 98 L. Ed. 2d 1 (1987); 2A N. Singer, Sutherland Statutory Construction § 46.06 (4th ed. 1984). It is incumbent upon the courts to give statutes "the most harmonious, comprehensive meaning possible. . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." Clark v. Uebersee Finanz-Korporation, A. G., 332 U.S. 480, 488-489, 68 S. Ct. 174, 92 L. Ed. 88 (1947). As this Court has repeatedly noted, "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Pittsburgh & L. E. R. Co. v. Railway Labor Executives' Ass'n, 491 U.S. 490, 510, 109 S. Ct. 2584, 105 L. Ed. 2d 415, (1989); see also, Morton v. Mancari, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). Courts are constrained "to give effect to each if we can do so while preserving their sense and purpose." Watt v. Alaska, 451 U.S. 259, 267, 101 S. Ct. 1673,68 L. Ed. 2d 80 (1981), and to engage in the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination. United States v. Fausto, 484 U.S. 439, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988).

The Court of Appeals' references to the appropriations bills therefore do not provide a sufficient basis for the review sought here.

IV. It Is Settled That The State Department's Opinion On The Interpretation Of The Jurisdictional Statute Merits No Special Deference. The State Department's Expression Of Concern For Retaliation Or Diplomatic Friction Was Vague, Speculative, And Not Based On A Foreign Policy Concern Particular To These Litigants. Upon Such A Showing, The Question of Deference to State Department Opinions Has Been Addressed By the Courts, With *Uniform* Results That Require Neither Correction Nor Clarification.

The Foreign Sovereign Immunities Act transferred the responsibility for making determinations concerning immunity from suit from the State Department to the courts.[21] See, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983). As noted in Republic of Austria v. Altmann, 541 U.S. 677, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004):

> The Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity, . . . and transfers primary responsibility for

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[21] "A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity." H.R. Rep. No. 94-1487 at 20, reprinted at 1976 U.S.C.C.A.N. at 6619.

immunity determinations from the Executive to the Judicial Branch.

"Pure questions of statutory construction," such as that embodied in the Court of Appeals' decision here, are "well within the province of the Judiciary." INS v. Cardoza-Fonseca, 480 U.S. 421, 446, 448, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987).

Altmann noted that (emphasis in original):

> While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference. . . . In contrast, should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy,

on a case by case basis, but it "express[ed] no opinion on the question whether . . . deference [to State Department expressions of opinion] should be granted in cases covered by the FSIA." Republic of Austria v. Altmann, 541 U.S. at 702.

In this case, the State Department provided its opinion on the interpretation of the jurisdictional statute, a matter that, as Altmann made clear, merits no special deference. Nor, even when discussing diplomatic considerations, did the State Department provide reasons why jurisdiction should not be exercised, as Altmann

requires, over a "particular" petitioner. Rather, as the Court of Appeals correctly stated, the possibilities cited by the State Department speak to a general fear of overseas retaliation, or diplomatic friction, "presented in a largely vague and speculative manner," and not in a degree "potentially severe enough or raised with the level of specificity required to justify presently a dismissal on foreign policy grounds." App. 22 n.17, 446 F.3d 277 n.16. Moreover, the State Department's opinions have a certain illogic. It was the spectre of reciprocal treatment cited by petitioners that provided the impetus to the international community to enact the Vienna Conventions that are the substantive subject matter of these litigations, and the very needs for predictability and evenhanded treatment which the State Department cites as necessary for diplomatic stability have been incorporated within the FSIA's jurisdictional provisions relied upon to allow for the orderly and fair adjudication of such questions in the United States courts.

Subsequent to Altmann, the question of deference has been addressed by the Courts of Appeal, with uniform results, including this case, that require neither correction nor clarification.[22] As noted by those cases and pre-Altmann cases,[23] the applicable standard is the principle

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[22] Whiteman v. Dorotheum GmbH & Co KG, 431 F.3d 57 (2d Cir. 2005); Abrams v. Societe Nationale des Chemins de Fer Francais, 389 F.3d 61 (2d Cir. 2004) (dicta); Wei Ye v. Jiang Zemin, 383 F.3d 620, 624-625 (7th Cir. 2004) (dicta); Hwang Geum Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005).

[23] E.g., 767 Third Avenue Associates v. Consulate General of Socialist Federal Rep. of Yugoslavia, 218 F. 3d 152, 160 (2d Cir. 2000).

governing political questions, the accepted formulation of which was set out in Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Baker noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211.[24] According to Baker, determining the amenability of a question to judicial resolution turns not on fear of or the likelihood of foreign repercussions, but requires a

> discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Baker v. Carr, 369 U.S. at 211-212. In case-by-case inquiries under the political question doctrine, the Courts have consistently employed one or more of the "six

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[24] See also, Japan Whaling Assoc. v. American Cetacean Soc., 478 U.S. 221, 229-230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986). "Not every case touching foreign relations is nonjusticiable." Whiteman v. Dorotheum GmbH & Co KG, 431 F.3d at 69, citing Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995); see also, Planned Parenthood Fed'n of America, Inc. v. Agency for Int'l Development, 838 F.2d 649, 655 (2nd Cir. 1988). As the First Circuit has observed, "For jurisdictional purposes, courts must be careful to distinguish between political questions and cases having political overtones." Ungar v. PLO, 402 F.3d 274, 281 (1st Cir. 2005); see also, Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, 937 F.2d 44, 49 (2d Cir. 1991).

independent tests" identified by the Supreme Court in Baker.[25]

As the Second Circuit noted here, and under the first three of the Baker tests, the parameters of the courts' subject-matter jurisdiction are not matters constitutionally committed to the executive branch. Judicially discoverable and manageable standards exist in FSIA for resolving the jurisdictional issue, and in the Vienna Conventions, inter alia, for resolving the substantive issues.[26] No policy determination not already embodied in positive law is thus required. As the Ninth Circuit wrote in Alperin v. Vatican Bank, 410 F.3d 532, 555 (9th Cir. 2005), "Deciding this sort of controversy is exactly what courts do."

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[25] See, 369 U.S. at 217. These tests include: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

[26] As noted by the Court of Appeals, App. 23, 446 F.3d at 377, "The instant dispute appears to revolve around the proper interpretation of a treaty (the Vienna Convention on Diplomatic Relations) and the application of that treaty to these facts. The Supreme Court has made clear that such a controversy is well within the competence and authority of the federal courts and is not a non-justiciable political question. See Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. at 230 (stating that "the courts have the authority to construe treaties").

This is not a situation, such as that in Whiteman v. Dorotheum GmbH & Co KG, 431 F.3d 57, Hwang Geum Joo v. Japan, 413 F.3d 45, or Garb v. Republic of Poland, 440 F.3d 579 (2d Cir. 2006), in which actions occurring outside the United States are cited as the prospective bases for the civil jurisdiction of United States courts. The subject matter of these suits does not pertain to a question of foreign policy at all, but, rather, because it involves rights in real property located within the United States, to one of quintessentially local interest. These cases concern rights in immovable property forming part of a pre-existing and ongoing legal environment into which petitioners have entered by purchasing, owning and using land in the United States, and as to which they have assumed responsibilities, subject to the limitations of international agreements, the parameters of which are appropriate for determination by United States courts. No countervailing interest has been identified that satisfies the relevant Baker tests so as to preclude the exercise of jurisdiction by the courts.

Nor is this a matter, such as Whiteman or Hwang Geum Joo, in which the United States, by executive agreement, had joined in the establishment of an alternative international forum for the settlement of claims, or committed its settled policy to a particular rule. The United States has entered into no agreements either promising any nation immunity from civil jurisdiction beyond that recognized by FSIA or authorizing the resolution of disputes of this nature in any forum other than American courts. The State Department's own representations to petitioners and other affected nations that they would be responsible for paying local property taxes on properties of the type involved in this suit indicate that an adjudication would not embarrass or demonstrate undue disrespect to a

settled policy of a coordinate branch of government. It has been the policy of the United States, consistent with the Vienna Conventions, not to provide exceptions to such property located outside the Washington, D.C. area from local real property taxation. Moreover, as the Court of Appeals noted, and as it has itself conceded, the State Department argued in the Englewood case for the proposition that tax liens implicate immovable property rights for purposes of the FSIA exception.[27]

Since no substantive questions have been reached at this juncture, and since the present decision of the Court of Appeals deals with only a threshold question involving the construction of the jurisdictional statute, that Court was correct in observing that "[i]n the course of the proceedings remanded to the district court, the United States is, of course, free to file a further statement of interest if it thinks developments so warrant." App. 22 n.17, 446 F.3d 277 n.16. In that significant regard, questions relating to the diplomatic ramifications of the amenability of the subject properties to taxation and the imposition of tax liens are asserted prematurely, and are not ripe for review.

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[27] "It is particularly inappropriate to defer to the executive branch's legal views here because its position as to the proper scope of the immovable-property exception is inconsistent with its previous interpretation." App. 22 n.17, 446 F.3d 277 n.16.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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